IN THE SUPREME COURT OF NOVA SCOTIA

Citation: National Bank Financial Ltd. v. Potter, 2008 NSSC 213

Date: 20080702
Docket: 206439
174293
193842
208293
216543
227347
Registry: Halifax

Between:

National Bank Financial Ltd.

Plaintiff

v.

Daniel Potter, Starr's Point Capital Incorporated, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Ronald Richter, Donald Snow, Meg Research.com Limited, 3027748 Nova Scotia Limited, Calvin Wadden, Raymond Courtney, Bernard Schelew, Blois Colpitts, Stewart McKelvey Stirling Scales, Bruce Clarke, 2317540 Nova Scotia Limited and Knowledge House Inc.

Defendants

And Between:

Bruce Clarke, Fiona Imrie, Gramm & Company Incorporated, 2532230 Nova Scotia Limited, 3020828 Nova Scotia Limited, Calvin Wadden, Bernard Schelew, Daniel Potter, Knowledge House Inc., Starr's Point Capital Incorporated, Donald Snow, Meg Research.com Limited, 3027748 Nova Scotia Limited and Raymond Courtney

Plaintiffs by Counterclaim

v.

National Bank Financial Ltd., National Bank of Canada, Real Raymond, Jean Turmel, Michael LaBonte, Lorie Haber, Guy Roby, Eric Hicks, Barry Morse, David Mack and Bruce Clarke

Defendants by Counterclaim

v.

Daniel Potter, Blois Colpitts, Stewart McKelvey Stirling Scales, and Bruce Clarke

Defendants by Cross-Claim

Knowledge House Inc. and Daniel Potter

Plaintiffs

v.

Stewart McKelvey Stirling Scales, Andrew W. Burke, R. Blois Colpitts and James R. Cruickshank

Defendants

The application and decision apply to the following related actions:

SH 174293 (Debt Action)
SH 193842 (Mahoney Action)
SH 208293 (Barthe Action)
SH 216543 (Keating Action)
SH 227347 (Banks Action)

Decision re: Costs

Judge: The Honourable Justice Gregory M. Warner

Heard: June 26, 2008, in Halifax, Nova Scotia

Counsel: **David G. Coles, Q.C., Joshua J. Santimaw** and **Steven McCardy** for National Bank Financial Ltd. *et al* ("NBFL")
W. Dale Dunlop, for Michael (Ben) Barthe, Lutz Ristow, Craig Dunham, Derek Banks, Plastics Maritime Ltd., Lowell Weir, Blackwood Holdings, Helical Corporation, Carole McLauchlin-Weir, Calvin Wadden, Michael Mahoney and 3031775 Nova Scotia Limited
John F. Rook, Q.C. for Stewart McKelvey Stirling Scales ("SMSS"), Andrew V. Burke, and James K. Cruickshank
George W. MacDonald, Q.C., and **Cheryl Hodder**, for 3058703 Nova Scotia Limited ("Keating")
Robert G. Belliveau, Q.C. for Staffing Strategists International
Daniel Potter, for himself, Knowledge House Inc. ("KHI") and Starr's Point Capital Incorporated
Mary Jane McGinty for Gary Blandford, Julia Blandford and 3017804 Nova Scotia Limited

By the Court:

A. Issue

[1] The successful Respondents seek solicitor and client costs, or alternatively "substantial indemnity" costs, in respect of this Court's dismissal on the basis of bad faith and prejudice of NBFL's application to amend its pleadings to remove its material fact allegations against Bruce Clarke (2008 NSSC 135).

[2] NBFL argues that:

a) absent a reference to costs in the decision, costs should be costs in the cause, per CPR 63.05(1);

b) solicitor and client costs are reserved for rare and exceptional circumstances and not every time that the Applicant's conduct is found reprehensible; and,

c) if costs are to be awarded, they should be party-party costs under the "old tariff" adjusted for inflation and should be discounted in respect of those arguments made by the Respondents that were not accepted by the Court.

B. Law

B.1 Civil Procedure Rules

[3] The relevant Civil Procedure Rules are:

> **Costs in discretion of court**
> 63.02
> (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,
> a) award a gross sum in lieu of, or in addition to any taxed costs;
> b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;
> c) direct whether or not any costs are to be set off.
> . . .
> (3) The court may deal with costs at any stage of a proceeding.
> . . .
> **When costs follow the event or are determined by the Rules**
> 63.03
> (1) Unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event.
> (2) Unless the court otherwise orders, the costs of and occasioned by,
> a) an amendment made under Rule 15 shall be borne, as provided in rule 15.10, by the party making the amendment;
> b) an application to extend the time fixed by any rule for serving or filing any document, or doing any other act, including the costs of any order made on the application, shall be borne by the party making the application;

c) proving the truth of any fact or the authenticity of any document that a party unreasonably denies or refuses to admit, shall be borne as provided in rule 21.04 by that party;

d) a proceeding tried with a jury shall follow the event as provided in rule 34.16.

. . .

Party and party costs fixed by the court

63.04

. . .

(2) In fixing costs, the court may also consider

a) the amount claimed;

b) the apportionment of liability;

c) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding;

d) the manner in which the proceeding was conducted;

e) any step in the proceeding which was improper, vexatious, prolix or unnecessary;

f) any step in the proceeding which was taken through over-caution, negligence or mistake;

g) the neglect or refusal of any party to make an admission which should have been made;

h) whether or not two or more defendants or respondents should be allowed more than one set of costs, where they have defended the proceeding by different solicitors, or where, although they defended by the same solicitor, they separated unnecessarily in their defence;

I) whether two or more plaintiffs, represented by the same solicitor, initiated separate actions unnecessarily; and

j) any other matter relevant to the question of costs.

Costs on interlocutory applications

63.05

(1) Unless the court otherwise orders, the costs of any interlocutory applications, whether ex parte or otherwise, are costs in the cause and shall be included in the general costs of the proceeding.

[4] While in general costs are awarded to the successful party on a party and party basis, ultimately costs are determined in the context of the circumstances of the application or action and are in the discretion of the Court (exercised judicially). This principle applies to both interlocutory applications and final dispositions.

C.1 First Issue - CPR 63.05 (1)

[5] Citing ***North American Trust Co.*** **v.** ***The Salvage Association*** (1998) 173 NSR 2d (249) (NSCA) ¶s 42 and 44, followed (it submits) in ***Nova Scotia Real Estate Commission*** **v.** ***Lorway,*** 2006 NSSC 256 ¶ 8, NBFL argues that because I was silent in respect of costs in my written decision, costs should be costs in the cause.

[6] I do not agree.

[7] In ***North American Trust***, the Court of Appeal upheld Justice Davison's award of costs on an interlocutory application, given without reasons but payable forthwith, and rejected suggestion that, as a general proposition in respect of all interlocutory matters, costs should be costs in the cause. The Court of Appeal upheld the award of costs as an appropriate form of disapproval of the Appellant's resistance to discovery examination.

[8] In ***Lorway***, in her decision on the merits of the application, Justice Hood asked for submissions on costs failing agreement. The nub of her decision was in ¶ 9. The interlocutory application was for an interim injunction; the action was for a permanent injunction. Both the interlocutory and main action issue involved interpretation of the same statutory provision. The interlocutory application was in effect a dress rehearsal for the main hearing. In that context, it was appropriate to order that costs be costs in the cause.

[9] NBFL's unsuccessful application before this Court was an application to amend its pleadings in a materially significant way without proffering reasons. It was not an obvious dress rehearsal for any of the likely issues at trial. For that reason the analysis in ***Lorway*** is not relevant.

[10] NBFL argues that silence about costs in the written decision on the merits of the application somehow restricts this Court's exercise of discretion to award costs other than costs in the cause. This Court is not functus on release of the written decision, but only by issuance of the Order. The Order provides that costs of the application would be determined after further submissions. This hearing constitutes the further submissions.

[11] I decline to award costs as costs in the cause

C.2 Second Issue - Whether costs should be payable forthwith.

[12] This interlocutory application dealt with a procedural matter as opposed to the substantive issues that will eventually be dealt with at trial.

[13] While at one time it may have been usual to defer costs of interlocutory applications to the end of the case, the length and complexity of modern litigation has led to a reversal of that trend except in those circumstances where the primary issue in the interim application is the same as that intended in the ultimate hearing, or where to award costs at an interim stage may prevent the matter from being determined on its merits at a later date. Generally the parties are better able to argue and the Court is better able to make the appropriate costs determination at the time of the application. Unless the costs award may be improved with the benefit of hindsight (after trial), the award should be paid when ordered. A finding after trial that no conspiracy or fraud against NBFL (and/or others) existed, or that Bruce Clarke was not part of any such conspiracy or fraud, is not relevant to this court's decision that this application was not advanced in good faith because it was made without an apparent bona fide reason connected to the issues, but rather appeared to be a tactical or strategic move that would assist in defending against an application and would delay the pleadings process.

[14] Costs are normally awarded to the successful party. These respondents have been successful in this application and should have their costs. Subject to the disposition of the appeal on the merits decision, costs should be payable forthwith.

C.3 Third Issue - Solicitor and Client Costs

[15] The law is not difficult but the application to the facts is.

[16] All parties cite **The Law of Costs, Second Edition**, by Mark M. Orkin (2007; Canada Law Book; looseleaf) Chapter 2.

[17] **Orkin** identified five purposes for costs awards. Paramount is the principle of indemnification. The others are: to encourage settlement, deter frivolous actions and defences, discourage unnecessary steps that unduly prolong the litigation, and to facilitate access to justice (§ 201). At § 219.1 **Orkin** deals with solicitor and client costs. He writes that an award of costs on a solicitor and client scale is ordered only in rare and exceptional cases to mark the Court's disapproval of the conduct of a party in the litigation.

[18] This "rare and exceptional circumstance" statement has been repeatedly adopted by courts. See ***Brown v. Metropolitan Authority***, (1996) 150 NSR (2d) 43 (NSCA) ¶ 94, and ***Campbell v. Lienaux et al.*** (***Lienaux #2***), 2001 NSSC 44 ¶ 479, affirmed on appeal 2002 NSCA 104. Unfortunately, as noted by Saunders J. in ***Campbell v. Lienaux et al., (Lienaux #1)*** (1997) 165 NSR (2d) 356 at ¶ 13, most decisions do not examine what would constitute a rare and exceptional circumstance.

[19] In ***Young* v. *Young*** [1993] 4 S.C.R. 3, McLaughlin, J. (as she then was) made the oft quoted statement: "Solicitor-client costs are **generally** awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis awarding solicitor-client costs . . ." (¶ 66).(Emphasis added.)

[20] Many decisions have discussed, and applied, this statement.

[21] In ***Petten* v. *E. Y. E. Marine Consultants***, 1998 CarswellNfld 351 (Nfld.S.C.T.D.), Green, J. (as he then was), conducted an articulate review of solicitor-client costs, beginning at ¶ 71, and of the ***Young*** statement at ¶ 79:

> 79 What does reprehensible, scandalous or outrageous conduct encompass? In *Perry*, Cameron, J. A. agreed with states in other cases that "reprehensible" was "a word of wide meaning" and that:
>
> > It can include conduct which is scandalous, outrageous or constitutes misbehaviour, but it also included milder forms of misconduct. It means simply "deserving of reproof or rebuke." . . .

He goes on to give examples of when awards for solicitor-client costs might be appropriate and inappropriate.

[22] To state that generally reprehensible conduct should result in an award of solicitor-client costs does not mean that reprehensible conduct should always result in an award of solicitor-client costs. It does not foreclose the requirement of an inquiry into the nature of the reprehensible conduct.

[23] This Court's application of the legal test for denying the pleadings amendment led to a finding of bad faith. The term "bad faith" is not monolithic. Its meaning is circumscribed by the legal test for amending pleadings and by the context in which it was applied.

[24] The legal test for pleadings amendments annunciated by our Court of Appeal in ***Scott Maritimes Pulp* v. *B. F. Goodrich*** (1977) 19 N.S.R. (2d) 181, ***Consolidated Foods* v. *Stacey*** (1986) 76 N.S.R. (2d) 182, and ***Jeffrey* v. *Naugler*** 2006 NSCA 117, are all adoptions of the "practice" of Bramwell, L.J. described in ***Tildesley* v. *Harper*** (1878), 10 Ch.D. 393, and recognized by Lord Esher M.R. in ***Steward* v. *North Metropolitan Tramways*** (1886), 16 Q.B. 556 (CA) as a rule of conduct that should generally be followed but not a rule of rigid law that can never be departed from.

[25] This Court's use of the term "bad faith" differs from the use in other contexts, many of which are described in the cases cited to the Court as involving blatant abuses of process and/or contempt.

[26] The circumstances, as outlined in this Court's decision (2008 NSSC 135), are not comparable to the conduct in ***Lienaux #2*** *supra* or in ***Toronto Dominion* v. *Lienaux*** (***Lienaux #3***) 2004 NSSC 234, or the circumstances described in ¶s 81 and 82 in ***Petten*** *supra*, or by Justice Scanlan in ***NBFL* v. *Potter*** 2005 NSSC 264.

[27] The circumstances are closer to those described in ***Lienaux #1*** *supra* (¶s 11 to 16) and ***Brown* v. *Metropolitan Authority*** *supra* (¶s 56 to 65).

[28] If:

a) the wide range of conduct described by Saunders J. (as he then was) in ***Lienaux #1*** *supra* at ¶s 13 and 14 does not constitute a rare and exceptional circumstance, or

b) the "highhanded and arbitrary" conduct of the Metropolitan Authority in ***Brown* v. *Metropolitan Authority*** *supra*, described by Pugsley, J.A. as reprehensible was not a rare and exceptional circumstance, or

c) the serious infringement of solicitor-client privilege in ***NBFL v. Potter*** (2005 NSSC 264) does not attract solicitor and client cost,

then NBFL's bad faith conduct in this case should not attract solicitor-and-client costs.

C.4 Party and Party Costs

[29] No party disputes that the pre-September 24, 2004 tariff ("Old Tariff") applies. The Old Tariff contains no specific reference to costs in respect of interlocutory applications. Tariff A speaks in terms of any decision or order in respect of which, when there is no "amount involved", consideration is given to the complexity of the proceeding and the importance of the issues.

[30] NBFL argues that traditionally chambers' applications attracted costs under the Old Tariff in the range of $300.00 to $1,500.00. Applying the inflation calculator, they submit this range is now $384.00 to $1,919.00. Given that the hearing consumed two full days, they suggest the range of party and party costs is between $768.00 and $3,838.00.

[31] NBFL further argues that, because this Court did not adopt the "admissions" argument of some of the Respondents nor the "Keating" submission, costs should be reduced to reflect these failings.

[32] The Respondents argue that:

a) the proceeding was complex and the issue involved important;

b) in exercising discretion the Court should consider the conduct of NBFL (CPR 63.04(2)(c)) and the Court's finding that the application was improper, vexatious, prolix or unnecessary (CPR 63.04(2)(e));

c) the Court has jurisdiction to award a gross sum in lieu of or in addition to taxed costs (CPR 63.02(1)(a)).

[33] In my view costs should not be limited to the table amount under the Old Tariff.

[34] At § 201, **Orkin** suggests that since ***Landymore* v. *Hardy*** (1992) 112 N.S.R. (2d) 410 (NSSC) ¶s 16 and 17, the philosophy of the Nova Scotia tariff is to provide a substantial contribution to the successful party's reasonable expenses, and that where the tariff does not represent a reasonable recovery, it is preferable to augment the tariff figure by a lump sum rather than by artificially manipulating the "amount involved". These points are reflected in several Nova Scotia decisions including ***Campbell-MacIsaac* v. *Deveaux*** (2005) 230 N.S.R. (2d) 305 (NSSC), and ***National Bank* v. *Potter***, 2005 NSSC 264.

[35] To this I add consideration of one of the five purposes of costs awards mentioned by Orkin that is relevant to this circumstance - to discourage unreasonable conduct. This purpose is particularly relevant to interlocutory applications and was a factor in the award of a lump sum in ***Lienaux #1*** *supra* (¶ 20). The use of lump sum cost awards was thoroughly reviewed by Justice Moir in ***Campbell* v. *Jones***, 2001 NSSC 139 (¶s 54 to 69) and applied by, for example, the Court of Appeal in ***Brown* v. *Metropolitan Authority*** *supra*, and the Supreme Court recently in ***Knox* v. *Maple Leaf Homes*** 2008 NSSC 114.

[36] The Respondents ask this Court to consider the admonition given by Justice Scanlan to NBFL respecting its conduct in the solicitor-client privilege decision. By analogy to the criminal sentencing principles, that NBFL is a repeat offender. In some circumstances that would be appropriate; however, the facts as found in this Court's decision respecting NBFL's conduct is unrelated to its improper conduct in the earlier decision (Justice Scanlan was particularly concerned about NBFL's attack on Potter's fundamental rights). I therefore do not factor this earlier admonition into this decision on costs.

[37] Nor do I accept NBFL's argument that costs should be discounted because I did not adopt the "admissions" or "Keating" arguments and because the arguments of the Respondents were repetitive. The Keating approach to NBFL's application exposed, and was illuminative of, NBFL's inappropriate approach to its material fact allegations against Bruce Clarke; it contributed in my assessment and conclusion. The "admissions" argument had appeal but had previously been determined; it did not lengthen the hearing significantly. The fact that six groups of Respondents opposed the application, thereby resulting in some overlap in arguments, should not reduce the cost awards to each. Each group of Respondents had a substantial stake in the outcome of the application by each of the six groups of Respondents was, *vis-a-vis* each other, in very different adversarial positions. It was not unreasonable for each to have participated actively in opposing the amendment application. I note that other parties, whose positions in the litigation was similar to one or more of the Respondents in this litigation (and who are affected by the proposed pleadings amendment) did not respond, but appear to have relied on those who did.

[38] I accept the argument that the award of a lump sum under the Old Tariff is the appropriate award in this case by reason of the application of the principle of substantial indemnification, and as a disincentive to parties making unnecessary, improper and unreasonable applications that unduly prolong the litigation.

Quantum

[39] None of the Respondents submitted information as to their actual solicitor-client costs related to this application. While the application was only filed after the January 8, 2008 Case Management Conference, it was the subject of communication amongst the parties since the fall of 2007. Some recent decisions of our Courts suggest that the general range of solicitor-client costs is $10,000.00 per day of hearing (I presume including preparation time). That figure conforms to my general understanding of what is happening.

[40] The "amount involved" in this case is unknown, or, at best, speculative. The review of the complex and lengthy history of the litigation was an important element in the presentation of the Respondents' argument and impacted on the Court's decision. The application was not simple and straight-forward. It was complex. It was of great importance to all of the Respondents. The briefs were thorough and extensive.

[41] Naively I scheduled the oral hearing for one-half day, but it filled two days, despite the efficient use of time and argument by the Respondents.

[42] A reasonable but substantial contribution to each of the six Respondents' costs, considering the complexity, importance and length of the application, and the need to discourage this kind of application, is $7,000.00, plus reasonable disbursements as agreed or, failing agreement, as verified by affidavit and taxed. I so order.

J.